

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1088

M.L.-S.F.

vs.

J.S.F.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

A single justice of this court denied the motion of M.L.-S.F. (wife) for a stay pending appeal of a judgment of contempt and an order denying her motion for relief from judgment in the Probate and Family Court.¹ The single justice also denied the wife's motion for reconsideration. The wife now appeals the single justice's orders. For his part, J.S.F. (husband) requests fees and costs pursuant to G. L. c. 231, § 6F, and Mass. R. Civ. P. 11, as amended, 456 Mass. 1401 (2010), in connection with this appeal. We conclude that the single justice did not abuse her discretion, and we affirm. We allow the husband's request for fees pursuant to § 6F.

¹ The wife filed a separate appeal from the judgment and order entered in the Probate and Family Court. That appeal, No. 18-P-1151, is addressed in a separate memorandum and order.

Discussion. 1. Motion for stay. "Decisions of a single justice will not be disturbed on appeal absent clear error of law or abuse of discretion." Fogarty v. Commonwealth, 406 Mass. 103, 106 (1989). "An appellant seeking a stay pending appeal must ordinarily meet four tests: (1) the likelihood of appellant's success on the merits; (2) the likelihood of irreparable harm to appellant if the court denies the stay; (3) the absence of substantial harm to other parties if the stay issues; and (4) the absence of harm to the public interest from granting the stay." C.E. v. J.E., 472 Mass. 1016, 1017 (2015), quoting J.W. Smith & H.B. Zobel, Rules Practice § 62.3, at 409 (2d ed. 2007).

Here, the wife did not satisfy the first test. As we concluded in our decision in No. 18-P-1151, the Probate and Family Court judge properly denied the wife's motion for relief from judgment and issued a contempt judgment against her. The wife does not advance any colorable claim on appeal, and instead seeks to relitigate the underlying divorce judgment, which this court has already affirmed. See M.L.-S.F. v. J.S.F., 91 Mass. App. Ct. 1128 (2017). We discern no legal error or abuse of discretion.²

² We also note that the wife suffered no harm by the denial of her requested stay. Even without the stay, as the parties advised at oral argument the marital home has not been sold, and the status quo was maintained during the pendency of the appeal.

2. Appellate fees and costs. The husband contends that the wife frivolously appealed the single justice's orders and requests appellate fees and costs under both G. L. c. 231, § 6F, and Mass. R. Civ. P. 11. Because we agree that the wife's appeal is frivolous, we allow the husband's request for fees pursuant to § 6F.³

General Laws c 231, § 6F, allows the court to deter claims that are "wholly insubstantial, frivolous and not advanced in good faith" by awarding "reasonable counsel fees and other costs and expenses incurred in defending against such claims." This applies to both appellate and trial claims. G. L. c. 231, §§ 6E-6F. A claim is frivolous if there is an "absence of legal or factual basis for the claim." Demoulas Super Mkts., Inc. v. Ryan, 70 Mass. App. Ct. 259, 267 (2007). A court may only award fees and costs under § 6F when the offending party "was represented by counsel during most or all of the proceeding,"

³ Rule 11 (a), which applies to proceedings before the single justice pursuant to Mass. R. Civ. P. 1, as amended, 474 Mass. 1402 (2016), prohibits pleadings "interposed for delay." However, the single justice, not the full court, is the correct adjudicator of any claim for rule 11 sanctions stemming from proceedings before the single justice. See Callahan v. Board of Bar Overseers, 417 Mass. 516, 519 (1994) ("a single justice may impose sanctions on an attorney in a pending matter under Mass. R. Civ. P. 11 [a]"); Doe v. Nutter, McClennen & Fish, 41 Mass. App. Ct. 137, 143 (1996) ("the single justice had the authority to make such an award under rule 11"). Here, the husband has requested rule 11 sanctions from the panel, not the single justice. Because this is not the proper venue for such a request, we decline to impose sanctions under rule 11.

which includes an attorney representing himself or herself.

O'Leary v. Education Resources Inst., Inc., 61 Mass. App. Ct. 653, 655 (2004).

Here, the wife is an attorney representing herself. Her arguments on appeal are nothing more than attempts to defy a valid court order to sell the marital home after her divorce, and relitigate her divorce after both trial and direct appeal. See M.L.-S.F., 91 Mass. App. Ct. at 1128 (wife's direct appeal from judgment of divorce).

We affirm the single justice's orders denying the wife's motions for a stay and for reconsideration. The husband is entitled to an award of fees and costs, as requested and supported by his brief and supplemental motion and supporting memorandum. See Fabre v. Walton, 441 Mass. 9, 10-11 (2004); Yorke Mgmt. v. Castro, 406 Mass. 17, 20 (1989). The wife shall have fifteen days after the date of the rescript to respond.

So ordered.

By the Court (Green, C.J.,
Massing & Shin, JJ.⁴),



Clerk

Entered: June 24, 2019.

⁴ The panelists are listed in order of seniority.